Supreme Court, U.S.
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92-1262
No.

In The

Supreme Court of the United States

October Term, 1992

MELBA J. BURRELL,

Petitioner,

v.

THE BOARD OF TRUSTEES OF GEORGIA MILITARY COLLEGE; James E. Baugh, individually and in his official capacities as Mayor of the City of Milledgeville, Georgia and Chairman of the Board of Trustees of Georgia Military College; Jacob L. Goldstein, individually and in his official capacities as a member of the Board of Directors of First Federal Savings and Loan Association of Milledgeville and as a member of the Board of Trustees of Georgia Military College; Alva L. Baggarly, individually and in his official capacities as Chief Executive Officer, President and member of the Board of Directors of First Federal Savings and Loan Association of Milledgeville; The First Federal Savings and Loan Association of Milledgeville; The Mayor and Aldermen of the City of Milledgeville; and Unknown Co-Conspirators,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether local government officials are entitled to the defense of qualified immunity, where they are alleged to have encouraged and acted in concert with a private employer to have a private employee discharged from her private employment in retaliation for the employee's exercise of constitutionally protected speech?

2. Whether the United States Court of Appeals for the Eleventh Circuit misapplied this Court's ruling in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) by holding that Respondent-government officials were entitled to qualified immunity, where these government officials did not demonstrate and could not have demonstrated that their alleged unconstitutional acts were done within the sphere of their official discretionary responsibilities?

II. LIST OF ALL PARTIES BELOW

The caption contains the names of all current parties to the proceeding.

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V. OPINIONS BELOW

On September 2, 1992 the United States Court of Appeals for the Eleventh Circuit, *inter alia*, reversed the district court's ruling which had denied Respondents' motion for summary judgment, and in so doing the Court of Appeals held that Respondents were immune to Petitioner's damage claim under 42 U.S.C. Section 1983 (1988) on grounds of qualified immunity. The opinion of Court of Appeals is reported at *Burrell v. Bd. of Trustees of Ga. Military College*, 970 F.2d 785 (11th Cir. 1992). The district court's opinion denying Respondents' motion to dismiss is reported at *Burrell v. Bd. of Trustees of Ga. Military College*, 696 F. Supp. 1522 (M.D.Ga. 1988). The two district court opinions denying Respondents' motions for summary judgment, including the motion for summary judgment on qualified immunity grounds, are unreported and are set forth at pages 1-4 and 5-9 in the appendix to this petition for writ of certiorari.

VI. JURISDICTION

i. Date of entry of opinion below

The opinion of the Court of Appeals was entered on September 2, 1992. (Appendix, 10-37)

ii. Date of order respecting rehearing

On October 29, 1992, the Court of Appeals denied Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc. (Appendix, 38-40) This petition for a writ of certiorari has been brought within 90 days of the

date of the denial of rehearing as required by Supreme Court Rule 13.1.

iii. Not under Rule 12.3 (No cross-petition)

This is not a Cross-Petition, and Petitioner hereby asserts that she knows of no party who intends to file such a petition, thus the provisions of Supreme Court Rule 12.3 do not presently apply.

iv. Statutory provision allowing review

Review is sought pursuant to 28 U.S.C. Section 1254(1) (1988) since Petitioner is asking the Court to review the decision of the United States Court of Appeals for the Eleventh Circuit.

VII. PRIMARY CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

i. U.S. Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

ii. U.S. Constitutional Amendment XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

iii. 42 U.S.C. Section 1983 (1988)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

VIII. STATEMENT OF THE CASE AND FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

i. Course of Proceedings and Jurisdiction Below

Petitioner Burrell filed this action on June 6, 1988 contending, *inter alia*, that she was discharged from her private sector employment with Respondent First Federal

Savings and Loan Association of Milledgeville [hereinafter "First Federal"] in retaliation for her and her husband's public criticism of the Georgia Military College Preparatory School [hereinafter "GMC"], and that Respondents Baugh and Goldstein, under color of state law as local government officials, encouraged and acted in concert with First Federal officials in having her discharged from her employment. (R1-18-3-18) Petitioner claimed that this action by Respondents was in violation of her clearly established right to freedom of speech guaranteed under the First and Fourteenth Amendments of the Constitution of the United States. *Burrell v. Bd. of Trustees of Ga. Military College*, 970 F.2d 785, 792 (11th Cir. 1992); (Appendix, 26). Petitioner invoked the jurisdiction of the district court under 28 U.S.C. Sections 1331, 1343(3) and 1343(4) and 2201, the suit being authorized, *inter alia*, by 42 U.S.C. Section 1983. *Burrell v. Bd. of Trustees of Ga. Military College*, 970 F.2d at 787; (Appendix, 11-13).

On March 14, 1990, the district court, the Honorable Duross Fitzpatrick presiding, held that Petitioner had adduced sufficient evidence to make out a *prima facie* case of civil conspiracy by Respondents Baugh and Goldstein and First Federal officials and therefore denied Respondents' motion for summary judgment on that ground. (Appendix, 1-4) On May 23, 1990 the district court denied Respondents' motion for summary judgment on grounds of qualified immunity. (Appendix, 5-9)

After granting Respondents' motion for an interlocutory appeal, pursuant to 28 U.S.C. Section 1292(b) (1988), a panel of the Court of Appeals on September 2, 1992 reversed the ruling of the district court and dismissed Petitioner's Section 1983 claims against Respondents

Baugh and Goldstein in their individual capacity on grounds of qualified immunity. *Burrell, supra,* 970 F.2d at 785-792; (Appendix, 19-28)[1] A timely suggestion for rehearing en banc and petition for rehearing was denied October 29, 1992. (Appendix, 38-40)

ii. Statement of the Facts

The facts material to consideration of the questions presented are the following: (1) that Petitioner was employed by First Federal, a private lending institution, *Burrell, supra,* 970 F.2d at 790-91; (Appendix, 22); (2) that in the period prior to her discharge, she, along with her husband, was a vocal public critic of the GMC Preparatory School, *Burrell,* at 791; (Appendix, 23-24); (3) that she was discharged from her private sector employment, *Burrell,* at 792; (Appendix, 25); (4) that Respondents Baugh and Goldstein were local government officials and there was no showing that their official discretionary duties in any way related to employment decisions at First Federal, *Burrell,* at 786; (Appendix, 11); and (5) that she contends in this action that Respondents Baugh and Goldstein,

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[1] Moreover, in its September 2, 1992 opinion, the Court of Appeals affirmed the district court's denial of qualified immunity to Respondents Baugh and Goldstein against Petitioner's claim brought under 42 U.S.C. Section 1985(3). *Burrell,* at 793-94; (Appendix, 29-31). The panel affirmed the district court's denial of qualified immunity to Respondents Goldstein and Baggarly in claims brought against them, pursuant to 42 U.S.C. Sections 1983 and 1985(3), in their capacities as officials of First Federal. *Burrell,* at 794-96; (Appendix, 31-37). This petition for writ of certiorari does not raise any questions concerning the validity of the Court of Appeal's rulings on these issues.

acting under the color of authority provided them by their official positions, encouraged and acted in consert with Petitioner's private employer to have her discharged in retaliation for her public criticism of GMC, *Burrell*, at 792; (Appendix, 26).

IX. REASONS FOR GRANTING THE WRIT

i. The Court of Appeals' decision allowing the defense of qualified immunity was contrary to this Court's mandate in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny, because Respondents could not have been acting within the sphere of their official discretionary responsibilities when they allegedly conspired to have Petitioner discharged from her private sector employment in retaliation for her exercise of protected speech.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court held that before a government official is entitled to the defense of qualified immunity, it must be shown that his actions in question were "within his sphere of official responsibility . . . ." *Id.*, at 815. "Immunity generally is available only to officials performing discretionary functions." *Id.*, at 816. *Accord, Anderson v. Creighton*, 483 U.S. 635, 638 (1987); and *Mitchell v. Forsyth*, 472 U.S. 511, 527-28 (1985). In the case *sub judice*, the Court of Appeals correctly pointed to this Court's decision in *Harlow*; however, it ironically omitted from its quotation from *Harlow*, the very language that requires government officials to be "performing discretionary functions" as a prerequisite to their entitlement to qualified immunity. *Cf. Harlow, supra,*

at 818 *with Burrell, supra*, 970 F.2d at 789-90; (Appendix, 20).

In approaching both qualified and absolute immunity issues, this Court has consistently, " . . . examine[d] the nature of the functions with which a particular official . . . has been lawfully entrusted, and . . . [sought] to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester v. White*, 484 U.S. 219, 224 (1988). *Accord, Westfall v. Erwin*, 484 U.S. 292, 299-300 (1988); *Harlow, supra*, 457 U.S. at 819 ("where an official's duties legitimately require action"); and *Burns v. Reed*, ___ U.S. ___, 111 S.Ct. 1934, 1939 (1991). The decision by the Court of Appeals in this case made absolutely no inquiry into whether the alleged unconstitutional acts of Respondents Baugh and Goldstein were within the sphere of their official discretionary responsibilities.[2] *See Burrell, supra*, 970 F.2d at 790, n.12 and 13; (Appendix, 20-21).

Petitioner's Section 1983 claim is against, *inter alia*, Respondent Baugh for actions taken under color of his office as the mayor of a municipality and chairman of the board of a public educational institution. *See Burrell, supra*, 970 F.2d at 789 and n.10; (Appendix, 18-19). Likewise, Respondent Goldstein is sued, *inter alia*, for actions taken under color of his office as a member the board of

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[2] Before both the Court of Appeals and the district court, Petitioner specifically contended that Respondents Baugh and Goldstein were not entitled to qualified immunity because their alleged unconstitutional acts could not have occurred within the scope of their discretionary authority as governmental officials. *See* Brief of Appellee in the Court of Appeals, pp. 28-29.

the same educational institution. *Id.* These Respondents did not make, and could not have made, any showing that their official discretionary duties, as members of the board of a public educational institution or as a mayor of a city, included playing any part whatsoever in a private lending institution's decision to discharge one of its employees. To apply qualified immunity, as did the Court of Appeals here, to alleged unconstitutional actions which undeniably did not fall within the sphere of official discretionary duties constituted a clear misapplication of the qualified immunity doctrine.

Indeed, it is difficult to imagine a more inappropriate activity by government officials than involvement in a private sector employment decision, wherein government officials under color of their office are encouraging private employers to discharge employees. Thus, these Respondents were not entitled to the defense of qualified immunity because they did not and could not satisfy *Harlow's* requirement that their actions be within the sphere of their official discretionary duties. By ruling that Respondents are entitled to qualified immunity, the Court of Appeals radically departed from the decisions of this Court concerning the circumstances under which government officials may avail themselves of the qualified immunity defense.

The purpose underlying the doctrine of qualified immunity is to accommodate two fundamentally conflicting interests. The first is the interest in providing a damage remedy to individuals whose clearly established constitutional rights have been violated. *See Harlow, supra,* 457 U.S. at 819; and *Anderson, supra,* 483 U.S. at 638. The second interest is ensuring that in circumstances

where clearly established constitutional rights are not implicated, government officials are free to carry out their legitimate discretionary duties without fear of a damage suit. *See Harlow, supra* and *Anderson, supra*. The radical expansion of the doctrine of qualified immunity by the Court of Appeals here to actions which have *nothing* whatsoever to do with official discretionary duties subverts the basic purpose underlying this immunity. Quite simply, if the action in question by the government official did not involve legitimate official duties, there exists no good reason to provide the official with immunity from suit.[3]

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[3] This erroneous application of the doctrine of qualified immunity by the Court of Appeals was not rendered harmless by its conclusion that Petitioner did not pretrial produce sufficient evidence of a Section 1983 conspiracy. The appeal from a non-final order in this case was permitted solely for the purpose of determining whether the district court erred in denying Respondents' claim of qualified immunity. *Burrell, supra*, 970 F.2d at 787-88; (Appendix, 14-15) . On the basis of this limited jurisdiction on appeal, the Court of Appeals correctly emphasized that it did not have the authority to decide whether Burrell's evidence was sufficient as to the merits of her conspiracy claims. *Burrell, supra*, 970 F.2d at 787, n.6, 789, n.9, 793 , n.18; (Appendix, 14, n.6, 18, n.9, and 28, n.18). Therefore, if the Court of Appeals's ruling that Respondents Baugh and Goldstein are entitled to qualified immunity is, as argued herein, wrong as a matter of law, then the judgment of the Court of Appeals should be reversed, and this action should be remanded to the district court in its entirety to proceed in the normal course.

ii. Specific reasons exist for granting this writ of certiorari that have importance beyond this case.

In the case *sub judice,* the Court of Appeals simply ignored the requirement that the alleged unconstitutional acts be within the scope of official discretionary duties before the defense of qualified immunity is available. In doing so it expanded the qualified immunity defense to circumstances [*i.e.*, where governmental officials unconstitutionally involve themselves in private sector employment decisions] this Court never intended the doctrine of qualified immunity to reach.

In light of the fact that the Court of Appeals' decision is reported, it is binding precedent in the Eleventh Circuit. As such it will obviously be utilized within that circuit by other government official-defendants who are attempting to shield themselves from liability for their unconstitutional intrusion into private sector decisions that are not legitimate concerns of government. Furthermore, the decision of the Court of Appeals will serve as persuasive authority in other circuits for government officials seeking to invoke qualified immunity in cases where their actions are undisputably not within the sphere of official discretionary duties. Moreover, the Court of Appeal's erroneous application of the qualified immunity doctrine will be incorrectly utilized in both private sector employment cases and in other settings in which government officials are alleged to have intruded unconstitutionally in matters completely unrelated to their official duties.

X. CONCLUSION

For these reasons, Petitioner respectfully submits that the decision by the United States Court of Appeals for the Eleventh Circuit is of such importance that it should be reviewed by this Court, and Petitioner respectfully requests the Court to enter an order granting this petition for a writ of certiorari.

Respectfully submitted this 26th day of January, 1993.

CHRISTOPHER COATES
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

MELBA J. BURRELL, Plaintiff	:	CIV. NO. 88-169-1-MAC(DF)
vs.	:	
THE BOARD OF TRUSTEES OF GEORGIA MILITARY COLLEGE, ET AL., Defendants	:	

ORDER

(Filed March 14, 1990)

Pending before the court are defendants' motions for summary judgment in this civil rights action. Under Rule 56(c) of the Federal Rules of Civil Procedure, a party moving for summary judgment must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The Eleventh Circuit has held that "[t]he moving party bears the burden of informing the district court of the basis for its motion, after which the non-moving party must make a showing sufficient to support finding the existence of all essential elements with respect to which the non-movant has the burden of proof at trial." *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990).

The court must inquire "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Langston v. Act*, 890 F.2d

380, 383 n. 7 (11th Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). The court believes that a reasonable jury could so find and thus the court finds that summary judgment is inappropriate in the present action. Genuine issues of material fact exist which can only be determined by the trier of fact: whether the defendants acted under "color of state law" in connection with the plaintiff's discharge (whether there is state action) and the existence of a conspiracy under 42 U.S.C. § 1985(3).

The private actors' conduct "is fairly attributable [to the state] only when the state has had some affirmative role, albeit one of encouragement short of compulsion, in the particular conduct underlying a claimant's civil rights grievance." *Langston*, 890 F.2d at 384 (quoting *NBC v. Communications Workers of America, AFL-CIO*, 860 F.2d 1022, 1025 n. 4 (1988)). The Eleventh Circuit has established three tests to determine when private action constitutes state action: (1) the public function test; (2) the state compulsion test; and (3) the nexus/joint action test. *See Langston*, 890 F.2d at 384; *NBC*, 860 F.2d at 1026.

No party contends that the first test, the public function test is applicable. Under the second test, the state compulsion test, the government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *San Francisco Arts & Athletes, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 546 (1987) (quoting *Blum v. Yaretsky*, 457

U.S. 991, 1004 (1982)).[1] Under the third test, the nexus/joint action test, the court addresses

> the question as to whether "the State had so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the enterprise." To charge a private party with state action under this standard, the governmental body and private party must be intertwined in a "symbiotic relationship."

NBC, 860 F.2d at 1022 (quoting *Jackson v. Metroplitan [sic] Edison Company*, 419 U.S. 345, 357-58 (1974)). Having considered the depositions and evidence submitted thus far, the court finds that the plaintiff has presented enough circumstantial evidence possibly to meet one of these two tests at trial.

After reviewing the briefs submitted by the parties, it appears to the court that a prima facie case of conspiracy to commit unconstitutional acts under 42 U.S.C. §§ 1983 and 1985(3) can be based upon circumstantial evidence. Circumstantial evidence has no less weight than direct evidence as long as it reasonably establishes that fact rather than anything else. The Supreme Court, in *Adickes v. S. H. Kress and Company*, 398 U.S. 144, 158 (1970), thought "it would be open to a jury, in light of the sequence that followed, to infer from the circumstances . . . " that the state actor and private party had a "meeting of the minds." The court finds that plaintiff has submitted enough circumstantial evidence regarding the

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[1] The instant case can be distinguished from *Blum*, in that plaintiff Burrell alleges that the private actors responded to governmental stimuli, and not vice versa.

elements necessary for a conspiracy to withstand defendants' motions for summary judgment.

The defendants may be right or may be wrong in their insistance that no conspiracy or joint action existed. That determination, however, will have to await a full hearing of the evidence both for and against the movants' position at a trial where credibility, relevance of evidence, burden of proof, and all the other elements of a trial on the merits are aired before a jury. Accordingly, the court hereby DENIES defendants' motions for summary judgment. The court understands that there are outstanding issues of law dealing with the immunity of some of the defendants and directs counsel to brief that issue within the next ten days.

SO ORDERED, this 14 day of March, 1990.

/s/ Duross Fitzpatrick
DUROSS FITZPATRICK,
JUDGE UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

MELBA J. BURRELL,	:	
Plaintiff	:	CIV. NO.
vs.	:	88-169-1-MAC(DF)
THE BOARD OF TRUSTEES OF GEORGIA MILITARY COLLEGE, ET AL.,	:	
Defendants	:	

ORDER

(Filed May 23, 1990)

Pending before the court are defendants' motions for summary judgment on grounds of qualified immunity. In its order of March 14, 1990, denying defendants' motion for summary judgment, the court reserved ruling on the issue of qualified immunity pending the submission of further briefs. The court has reviewed the briefs, and, in addition, heard oral argument on the issue on May 2, 1990.

In its March 14, 1990 order, the court found that genuine issues of material fact existed with regard to plaintiff's 42 U.S.C. § 1983 claims and the existence of a conspiracy under 42 U.S.C. § 1985(3). The court therefore held that plaintiff had submitted enough circumstantial evidence to withstand defendants' motion for summary judgment. The court finds that for the purposes of defendants' motion for summary judgment on the ground of qualified immunity that the case requires "substantial

factual development" before it can be determined with finality that plaintiff has or has not been deprived of her constitutional rights. *See Riley v. Wainwright*, 810 F.2d 1006, 1007 (11th Cir. 1986), *reh. denied* (1987); *Goddard v. Urrea*, 847 F.2d 765 (11th Cir. 1988).

"[T]he parties' actual allegations create a genuine dispute which bears upon the good faith or reasonableness" of defendants' actions. *Goddard*, 847 F.2d at 768. The Eleventh Circuit in *Goddard* explained that "[t]he district court found that if the agents falsely informed Bonnie Goddard that the subpoena was a search warrant, or only partially explained to Dennis Goddard the nature of the document and his compliance options, 'a jury would be entitled to find that the defendant's search and seizure violated clearly established constitutional rights of which a reasonable person would have known.' " *Id.* at 767. A similar situation exists in the case at bar. If the governmental defendants encouraged and acted in concert with First Federal Officials to have the plaintiff fired from her employment, a jury would be entitled to find that such acts violated clearly established constitutional rights of which a reasonable person would have known.[1] There is a factual dispute as to whether the defendants encouraged the private actor, First Federal, to discharge the plaintiff, or whether the defendants jointly participated with First Federal in her discharge, or whether the defendants acted at all. "A litigant's credibility and the weight

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[1] Plaintiff's First Amendment right to speak on matters of public concern is clearly established. *See Connick v. Myers*, 461 U.S. 138 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

to be given testimony are matters for the consideration of a fact-finder." *Goddard*, 847 F.2d at 768.

The private defendants, Jacob L. Goldstein[2] and Alva Baggarly[3] have also moved for summary judgment on the basis of qualified immunity.[4] The defendants cite *Jones v.*

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[2] Goldstein is a private defendant individually and in his official capacity as a member of the board of Directors of First Federal Savings and Loan Association of Milledgeville. He is a public defendant in his official capacity as a member of the Board of Trustees of Georgia Military College.

[3] Plaintiff filed suit against Baggarly individually and in his official capacity as Chief Executive Officer of First Federal.

[4] *See* Letter from Carr G. Dodson [attorney for First Federal, Baggarly, and Goldstein in his capacity of member of Board of Directors of First Federal] to Judge Fitzpatrick (April 3, 1990). The letter refers to a motion for qualified immunity on behalf of these defendants. The court could not find any motion formally filed regarding summary judgment on the grounds of qualified immunity; nor did counsel file any supplementary pleadings as directed by the court in its March 14th order. Counsel for these defendants raised the issue, however obliquely, in their original Brief in Support of Defendants Goldstein's and Baggarly's Motion to Dismiss and/or Motion for Summary Judgment, p. 15. "Defendant Baggarly as a director has the same immunity as defendant Goldstein. Defendant Baggarly as an officer has the same immunity as a director." In its order of September 28, 1988, the court denied defendants' motion to dismiss, the court left open the opportunity for defendants to file a motion for summary judgment at a later date. The court granted defendants permission to do so during a telephone conference call on October 23, 1989. During oral argument on the motions for summary judgment held on February 28, 1989, counsel for the private defendants raised the defense, arguing that if these defendants are deemed to be state actors, they are entitled to a qualified immunity defense. In light of the above, the court will address the qualified immunity of the private defendants.

Preuit & Mauldin, 851 F.2d 1321 (11th Cir. 1988), *vacated on other grounds*, ___U.S.___, 109 S.Ct. 1105 (1989), wherein the Eleventh Circuit held that "private defendants are entitled to a defense of qualified immunity in wrongful attachment actions under section 1983." *Preuit & Mauldin*, 851 F.2d at 1324. Apparently, defendants would extend this defense to private defendants who are deemed to be state actors for the purposes of 42 U.S.C. §§ 1983 and 1985(3). This court holds that its finding above that the case requires substantial factual development as to the good faith and reasonableness of the public defendants as state actors also goes to the private defendants as state actors, thus the court denies the private defendants' claim for qualified immunity.[5]

The court finds that plaintiff has raised questions of material fact "regarding defendant[s]' commission of acts in violation of plaintiff's clearly established rights" to defendants' claim of qualified immunity. *Peppers v. Coates*, 887 F.2d 1493, 1496-97 n. 7 (11th Cir. 1989). There are too many factual allegations that must be developed.

For the reasons stated above, the court hereby DENIES defendants' motion for summary judgment on the ground of qualified immunity.

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[5] The court therefore need not decide whether to extend *Preuit & Mauldin* at this time. The court is inclined to oppose such an extension, however, the argument has not been fully briefed by either of the parties.

SO ORDERED, this 23 day of May, 1990.

/s/ Duross Fitzpatrick
Duross Fitzpatrick, Judge
United States District Court

Melba J. BURRELL, Plaintiff-Appellee,

v.

The BOARD OF TRUSTEES OF GA. MILITARY COLLEGE, et al., Defendants,

Jacob L. Goldstein, etc., and
Alva L. Baggarly, etc.,
Defendants-Appellants.

Melba J. BURRELL, Plaintiff-Appellee,

v.

The BD. OF TRUSTEES OF GA. MILITARY COLLEGE, Alva L. Baggarly, Individually & in his official capcity as Chief Exec. Officer of First Fed. Sav. & Loan Assn. of Milledgeville, the Mayor and Aldermen of the City of Milledgeville and Unknown Co-Conspirators, Defendants,

James E. Baugh, Indiv. & in his official capacities as Mayor of the City of Milledgeville, Ga. & Chairman of the Bd. of Tr. of Ga. Military College, Jacob L. Goldstein, Indiv. & in his official capactities as a member of the Bd. of Dir. of First Fed. Sav. & Loan Assn. of Milledgeville & as a member of the Bd. of Tr. of Ga. Military College, Defendants-Appellants.

Melba J. BURRELL, Plaintiff-Appellee,

v.

The BOARD OF TRUSTEES OF GA. MILITARY COLLEGE, James E. Baugh, Chairman of the Board of Trustees of Ga. Military College, Jacob L. Goldstein, as a member of the Board of Trustees of Ga. Military College, and the Mayor and Alderman of the City of Milledgeville, Defendants-Appellants,

Alva L. Baggarly, etc., et al., Defendants.

Nos. 90-8540, 90-8760 and 90-8930.

United States Court of Appeals,
Eleventh Circuit.

Sept. 2, 1992.

Appeals from the United States District Court for the Middle District of Georgia.

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and HILL, Senior Circuit Judge.

TJOFLAT, Chief Judge:

This opinion consolidates three appeals, Nos. 90-8540, 90-8760, and 90-8930, from an order of the United States District Court for the Middle District of Georgia denying motions for summary judgment on the ground of qualified immunity. Melba J. Burrell (Burrell) has brought an action in the United States District Court for the Middle District of Georgia against James E. Baugh, mayor of Milledgeville, Georgia, and chairman of the board of trustees of Georgia Military College (GMC); Jacob L. Goldstein, a member of the board of directors of First Federal Savings and Loan Association of Milledgeville (First Federal) and of GMC's board of trustees;[1] Alva L. Baggarly, First Federal's chief executive officer and president, and a member of First Federal's board of directors; GMC's board of trustees; the Mayor and Aldermen of the City of Milledgeville; and unknown co-conspirators, alleging that she was fired from her job as First

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[1] Burrell sues Baugh and Goldstein in their individual and official capacities.

Federal's senior vice president in violation of 42 U.S.C. §§ 1983[2] and 1985(3)[3] (1988).[4] Specifically, Burrell alleges the following conspiracy in her complaint: "Baugh, Goldstein, Baggarly, and unknown co-conspirators . . . reached

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[2] Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (1988).

[3] Section 1985(3) provides in relevant part:

> If two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws . . . ; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is . . . deprived of having and exercising any right or privilege of a citizen of the United States, the party so . . . deprived may have an action for the recovery of damages occasioned by such . . . deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1988).

[4] Burrell also brought a Title VII claim against First Federal under 42 U.S.C. §§ 2000e and 2000e-3 (1988), which is not at issue in these appeals.

an agreement and entered into a conspiracy, the object of which was to discharge [Burrell] from her employment with . . . First Federal in retaliation for her and her husband's public criticism of . . . GMC." The complaint further asserts that "[i]n concert[, Baugh, Goldstein, Baggarly, and unknown co-conspirators] participated in certain overt acts in furtherance of said conspiracy, including but not limited to, conversations involving themselves and employees of the City of Milledgeville pertaining to how acts of retaliation might be carried out against [Burrell] and her husband and how [Burrell] could be discharged from her employment with . . . First Federal for alleged job-related reasons." Burrell seeks reinstatement to her position as senior vice president with backpay and compensatory and punitive damages.

Baugh, Goldstein, and Baggarly moved for summary judgment on the ground of qualified immunity.[5] The district court denied their motions, and the three now appeal

[5] In its order denying all motions for summary judgment on the ground of qualified immunity, the district court determined that Goldstein, as a private defendant in his capacity as member of First Federal's board, and Baggarly "moved for summary judgment on the basis of qualified immunity." As the court remarked in a footnote, however, neither Goldstein, as a private defendant, nor Baggarly ever "formally filed" a motion "regarding summary judgment on the ground[] of qualified immunity; nor did [they] file any supplementary pleadings [on 'outstanding issues of law dealing with the immunity of some of the defendants'] as directed by the court in its March 14th order [denying summary judgment on other grounds]." The court apparently decided that Goldstein and Baggarly had met their burden of pleading qualified immunity by raising the issue at oral argument on their motion for summary judgment on other grounds. While we reemphasize that qualified immunity will be unavailable to those who do not raise it, *see Moore v. Morgan*, 922

in Nos. 90-8540 and 90-8760. Baugh and Goldstein also join the Mayor and Aldermen of Milledgeville and GMC's board in their appeal under 28 U.S.C. § 1292(b) (1988) in No. 90-8930.

In appeal No. 90-8540, we reverse the denial of qualified immunity to Baugh and Goldstein as public officials against Burrell's section 1983 claim, and affirm the denial of qualified immunity to Baugh and Goldstein against Burrell's section 1985(3) claim and to all other appellants. In appeal No. 90-8760, we affirm the denial of qualified immunity to all appellants. We dismiss appeal No. 90-8930 for lack of jurisdiction. After disposing of the jurisdictional issues, we will discuss the merits of appeals Nos. 90-8760 and 90-8540 in order.[6]

I.

A.

We have jurisdiction to entertain appeals Nos. 90-8540 and 90-8760 under *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), which held that a "denial of a claim of qualified immunity, to the extent that it turns on an issue of law," *id.* at 530, 105 S. Ct. at 2817, constitutes an appealable collateral order as defined by *Cohen v. Beneficial Industrial Loan Corp.*, 337

F.2d 1553, 1557 (11th Cir.1991), we will not disturb the district court's determination that Goldstein and Baggarly met their burden of pleading in this case.

[6] We emphasize that we express no opinion about the merits of any of Burrell's claims. We merely review the district court's denial of qualified immunity. *See infra* notes 9 and 18.

U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). Even assuming, without deciding, that some facts remain disputed in this case, the mere existence of a factual quarrel does not affect the appealability of a denial of qualified immunity. *See Howell v. Evans*, 922 F.2d 712, 717-18 (11th Cir.), *vacated as moot*, 931 F.2d 711 (11th Cir.1991); *see also Bennett v. Parker*, 898 F.2d 1530, 1535-37 (11th Cir.1990) (Tjoflat, C.J., concurring), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1003, 112 L. Ed. 2d 1085 (1991).

Appeals Nos. 90-8540 and 90-8760 do not escape our jurisdictional grasp simply because Burrell seeks equitable as well as legal relief. Qualified immunity does not shield against equitable claims. *Marx v. Gumbinner*, 855 F.2d 783, 787 (11th Cir.1988). We recently have held, however, that a denial of qualified immunity remains immediately appealable, even where the government official would have to stand trial on the equitable claims left undisturbed by a grant of qualified immunity as to the legal claims. *Id.* at 786-88. Although *Marx* alone disposes of the jurisdictional question, we point out that Baugh, Goldstein, and Baggarly would not have to face the tribulations of trial on the equitable claims even if they should not be immune from the legal claims. With the possible exception of Baggarly,[7] they could not provide Burrell with the equitable relief she seeks because they would be in no position to reinstate her as senior vice president at First Federal.

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[7] It is not entirely clear from the record whether Baggarly would be authorized to rehire Burrell without obtaining the approval of First Federal's board.

Our jurisdiction over appeals Nos. 90-8540 and 90-8760 also remains untainted by our ultimate conclusion that certain defendants were not entitled to raise the qualified immunity defense in the first place. If we have jurisdiction to determine whether a particular defendant generally eligible to raise qualified immunity may benefit from it in the particular case at hand, we surely have jurisdiction to determine whether qualified immunity may shield that defendant as a general matter.

B.

Appeal No. 90-8930 reaches us from an order entered by the district court pursuant to 28 U.S.C. § 1292(b) (1988). An administrative panel of this court granted GMC's board, Baugh, Goldstein as a member of GMC's board, and the Mayor and Aldermen of Milledgeville leave to appeal pursuant to section 1292(b). We have concluded that their motion for leave to appeal was improvidently granted and vacate the order allowing this appeal to proceed. Under section 1292(b), a district court may certify for appeal a non-final order if the court finds that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and that resolution of the question "may materially advance the ultimate termination of the litigation."[8]

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[8] 28 U.S.C. § 1292(b) (1988) provides that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an

The district court certified the following issue for appeal pursuant to section 1292(b):

> After reviewing the briefs submitted by the parties, it appears to the court that a prima facie case of conspiracy to commit unconstitutional acts under 42 U.S.C. §§ 1983 and 1985(3) can be based upon circumstantial evidence. Circumstantial evidence has no less weight than direct evidence as long as it reasonably establishes that fact rather than anything else. The Supreme Court, in *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 158, 90 S. Ct. 1598, 1609, 26 L. Ed. 142 (1970), thought "it would be open to a jury, in light of the sequence that followed, to infer from the circumstances . . . " that the state actor and private party had a "meeting of the minds." The court finds that plaintiff has submitted enough circumstantial evidence regarding the elements necessary for a conspiracy to withstand defendants' motions for summary judgment.

This passage identifies one question of law: whether a prima facie case of conspiracy under 42 U.S.C. §§ 1983 and 1985(3) may rely on circumstantial evidence. We fully agree with the district court that this question must be

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> immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

answered in the affirmative. Indeed, our agreement with the district court is so complete and unequivocal that we cannot make out the "substantial ground for difference of opinion" required by section 1292(b). Accordingly, we dismiss appeal No. 90-8930.[9] *Cf. In re Grand Jury Proceedings,* 832 F.2d 554, 557 (11th Cir.1987) (no jurisdiction to entertain 1292(b) appeal in non-civil action); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater,* 777 F.2d 598, 607 (11th Cir.1985) (leave to appeal pursuant to section 1292(b) improvidently granted), *cert. denied,* 476 U.S. 1116, 106 S. Ct. 1973, 90 L. Ed. 2d 656 (1986).

Having settled the jurisdictional question, we now address appeals Nos. 90-8760 and 90-8540 in turn.

II.

Baugh and Goldstein bring appeal No. 90-8760 individually and in their official capacities as mayor of Milledgeville and chairman of GMC's board of trustees, and

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[9] The parties mistakenly treated the permission to appeal pursuant to the district court's 1292(b) certification as an invitation to challenge the court's denial of summary judgment on grounds other than qualified immunity. In fact, the appellants in No. 90-8930 make no effort to address the purportedly "controlling" legal issue certified by the district court under § 1292(b). Accordingly, they argue that Burrell failed to make out a claim under §§ 1983 or 1985(3). We have no jurisdiction to consider these arguments. First, we have no jurisdiction to entertain an appeal from a denial of summary judgment on grounds other than qualified immunity. *See Marx v. Gumbinner,* 855 F.2d 783, 791 n. 15 (11th Cir.1988). Second, we have no jurisdiction to consider attacks on a non-final order unrelated to the resolution of the specific legal question identified by the district court in its § 1292(b) order.

member of GMC's board of trustees, respectively.[10] We reverse the district court's denial of their motion for summary judgment on the ground of qualified immunity as to Burrell's section 1983 claim and affirm it as to Burrell's section 1985(3) claim. We first turn to the section 1983 claim.

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[10] We discuss only whether Baugh or Goldstein were entitled to qualified immunity in their individual capacities. It is clear that neither of them could be qualifiedly immune in their official capacities. "[S]uits against an official in his or her official capacity are suits against the entity the individual represents." *Parker v. Williams*, 862 F.2d 1471, 1476 n. 4 (11th Cir.1989). We therefore treat Burrell's claims against Baugh and Goldstein in their official capacities as claims against the City of Milledgeville and GMC. As qualified immunity does not shield municipal entities, Baugh in his official capacity as mayor of Milledgeville is not entitled to qualified immunity. *See Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980); *see also Tittle v. Jefferson County Comm'n*, 966 F.2d 606, 611 (11th Cir.1992); *Moore v. Morgan*, 922 F.2d 1553, 1556 (11th Cir.1991). We do not decide whether Baugh or Goldstein are state officials because they serve on the board of GMC, an institution established and funded primarily by the State of Georgia, or municipal officials because they hold their board positions on account of their mayoral office and a direct vote by the city electorate, respectively. *See Robinson v. Georgia Dep't of Transp.*, 966 F.2d 637 (11th Cir.1992) (outlining and applying test for determining whether an entity is an "arm of the State" for Eleventh Amendment purposes). In the first case, Baugh and Goldstein in their official capacities would be entitled to complete Eleventh Amendment, not qualified, immunity. *See Parker*, 862 F.2d at 1475-76. We could not consider this issue, however, because this appeal lies from a denial of qualified, not Eleventh Amendment, immunity. In the latter case, neither Baugh nor Goldstein would enjoy qualified immunity for the same reasons that deprive Baugh of this type of limited immunity in his official capacity as mayor of Milledgeville.

A.

"[G]overnment officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). It is assumed for purposes of this appeal that Baugh and Goldstein[11] are government officials for qualified immunity purposes.[12]

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[11] Goldstein, unlike Baugh, is also a private defendant in his capacity as a member of First Federal's board of directors. *See infra* part III.

[12] This assumption, however, should not obscure our serious doubts about the presence of state action under the First and Fourteenth Amendments and action under color of state law for Section 1983 purposes, even assuming counterfactually that Burrell had managed to fill the record with inferable facts supporting a finding that Baugh, Goldstein, and Baggarly conspired to have Burrell fired. While absence of state authorization does not dispose of either question, a public official not authorized to engage in the allegedly unconstitutional activity will only act under color of state law if the act was accomplished by " '[m]isuse of power, possessed by virtue of state law and made possible only because the alleged wrongdoer was clothed with the authority of state law.' " *See Brown v. Miller,* 631 F.2d 408, 411 (5th Cir.1980) (citing *Monroe v. Pape,* 365 U.S. 167, 184, 81 S. Ct. 473, 482, 5 L. Ed. 2d 492 (1961), *overruled on other grounds by Monell v. Department of Social Servs.,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). Similarly, state action will only be present if "an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong." *Home Tel. & Tel. Co. v. City of Los Angeles,* 227 U.S. 278, 287, 33 S. Ct. 312, 315, 57 L. Ed. 510 (1913).

Otherwise neither Baugh nor Goldstein could raise qualified immunity.[13] Our review of the district court's denial of qualified immunity therefore scrutinizes the district court's determination that, "consider[ing] in the light most favorable to the plaintiff all facts fairly inferable from the record[,] the inferable facts, if true, constitute a violation of clearly established law by the defendant[s]." *Bennett*, 898 F.2d at 1535 n. 2 (Tjoflat, C.J., concurring); *Greason v. Kemp*, 891 F.2d 829, 831 (11th Cir.1990).

Milledgeville is a town of about 18,000 in the heart of Georgia. Georgia Military College is a military school in

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[13] True, *Harlow* restricts qualified immunity to "government officials," while the constitution requires "state action." Since § 1983 requires action "under color of state law," only government officials acting under color of state law may assert qualified immunity. Accordingly, there remains the theoretical possibility that a government official acting under color of state law might not satisfy the state action requirement. The concepts of action under color of state law and state action, however, are coterminous. *See* Chester J. Antineau, 1 Federal Civil Rights Acts § 56 at 103 (2d ed. 1980). Nevertheless, while the Supreme Court has held that every act that meets the state action requirement also constitutes action under color of state law, it has not held the converse. The situation identified by the Supreme Court in which action under color of state law would not constitute state action, however, has little relevance to the present case. The Court gave the example of a private individual applying a state statute, which was held to constitute action under color of state law, but which might not constitute state action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 n. 18, 102 S. Ct. 2744, 2752, n. 18 (1982). In contrast, the Court pointed out that "it is clear that in a § 1983 action brought against a state official, [as in the present case,] the statutory requirement of action 'under color of state law' and the 'state action' requirement . . . are identical." *Id.* at 929, 102 S. Ct. at 2744.

Milledgeville which operates a preparatory school with grades six through twelve and a junior college. Although GMC charges some tuition, it is a public institution created by state law and relies heavily on state funds. GMC is run by its board of trustees, which has seven members, one of whom, the chairperson, is the mayor of Milledgeville, while the remaining six are elected by the voting population of Milledgeville. Baugh is the mayor of Milledgeville and the chairperson of GMC's board of trustees. Goldstein is a member of GMC's board.

First Federal is a savings and loan association in Milledgeville. At the time of Burrell's discharge, First Federal's board of directors had eight members, including Goldstein, Baggarly, and Burrell. Baggarly also serves as First Federal's chief executive officer.

Burrell began working at First Federal as a teller in 1972. She worked herself up through the ranks and on January 1, 1986 was promoted to the position of senior vice president. In September of that year she also was appointed to First Federal's board of directors, and between January and July 1987 she served as acting chief executive officer (CEO). Declining the board's invitation to apply for the permanent CEO position, Burrell assisted the board in its selection of a new CEO.

On July 1, 1987, Baggarly joined First Federal as president and CEO. Burrell stayed on as senior vice president. Shortly after Baggarly's arrival on the job, conflicts over their respective responsibilities arose between Burrell and Baggarly. These conflicts escalated to the point where both Burrell and Baggarly decided to place their

grievances before First Federal's board. The board meeting was set for April 20, 1988.

Before we turn to the board meeting, we temporarily pick up a parallel story line which will lead us on a different path to the same meeting. In early 1987, an anonymous letter critical of the level of public assistance received by GMC appeared in *The Atlanta Constitution*. This letter created a big stir in Milledgeville. On account of their previous public criticisms of GMC, Burrell and her husband, Charles Burrell, were among those suspected of having written the letter. Shortly after the anonymous letter appeared, Goldstein, who had known Burrell since 1972 and habitually dropped by First Federal to chat with her, visited Burrell at her office and informed her that Baugh apparently thought Burrell might have written the letter. Goldstein also told Burrell that "we would hope that you would not be doing anything against G.M.C."[14] Burrell denied having authored the letter. Some weeks later, Goldstein again brought up the anonymous letter during another visit to Burrell at First Federal. He reported to Burrell that a fellow GMC trustee defended her in a discussion about possible authors of the anonymous letter.

On March 12, 1988, *The Milledgeville Union Recorder* published a letter to the editor signed by Burrell which accused GMC of improperly charging tuition while receiving public funds, of discriminating against poor students by charging tuition, of advancing the goal of

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[14] During the course of her two depositions in this case, Burrell at times testified that Goldstein did not speak in the plural, but referred only to his own wishes.

racial segregation, and of practicing racial discrimination in its hiring practices. Some days later, *The Macon Telegraph* picked up the letter and *The Atlanta Constitution* printed an article about GMC based on an interview with Burrell.[15] In the wake of Burrell's public indictment of GMC, First Federal lost around $100,000 in deposits, with Sonny Goldstein, defendant Goldstein's brother, withdrawing approximately ninety percent of that amount.[16]

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[15] Around the end of March and the beginning of April, Baggarly met Baugh for the first and last time in Baugh's office at City Hall. Both Baggarly and Baugh flatly deny that, at that meeting or at any other time, they discussed Burrell, her criticism of GMC, or any plans to have her fired. Burrell admitted at deposition that she did not know what Baugh and Baggarly discussed at the meeting. Baggarly testified on deposition that he tried to convince Baugh to participate in a chamber of commerce membership drive he headed. According to Baggarly, he asked Baugh to speak at a kickoff campaign the next day and publicly to join the chamber of commerce at that campaign. Baugh confirms that they did not discuss Burrell and that Baggarly asked him for a private donation to the chamber of commerce. Considering that Burrell cannot offer evidence of the contents of Baugh's and Baggarly's meeting, that Baugh and Baggarly provide a reasonable and consistent explanation for their meeting, that Baugh and Baggarly flatly deny to have discussed Burrell, only one fact can be inferred from their meeting: that the meeting took place. Any conclusion about the content of their discussion in contradiction to their testimony would qualify as speculation, not inference. In sum, the naked fact of Baugh's and Baggarly's meeting, considered independently or in conjunction with all other inferable facts in the record, does not permit the inference that Baugh and Baggarly conspired to have Burrell fired.

[16] Burrell and her husband also testified on deposition that Howard Pounds, the Milledgeville fire chief, told them about at least one meeting at City Hall involving Baugh, Goldstein, and

On April 20, 1988, First Federal's board met to settle the conflict between Burrell and Baggarly. Burrell and Baggarly separately addressed the board. After a discussion that centered on Burrell's and Baggarly's inability to cooperate but also touched on the loss of deposits caused by Burrell's criticism of GMC, the board authorized Baggarly to exercise his power as CEO to take whatever action he deemed appropriate regarding any employee of First Federal. Baggarly then requested Burrell's resignation, but Burrell refused to step down. Baggarly fired her the next day.[17]

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at least one other member of the board of aldermen. According to Charles Burrell, Pounds alerted them to "retaliation measures [that are] being planned, taken by persons who are in places of power in the City." Specifically, Charles Burrell testified about meetings Pounds overheard, or participated in, during which a conspiracy to have his wife fired was discussed. The Burrells' testimony regarding Pounds' statements about the meetings at City Hall would be inadmissible in court as hearsay. Pounds, moreover, categorically denied ever having made any of the statements the Burrells attribute to him or ever having overheard or participated in any conspiratorial meetings at City Hall. The Burrells' statements therefore cannot form the basis on which we can infer facts in support of their claims. The same applies to the barrage of other statements and acts the Burrells attribute to Pounds, in particular statements regarding Baugh's alleged support for a petition introduced after the letter of March 12, 1988, at a deacons' meeting of the Burrells' and Pounds' baptist church, which called for the personnel committee and the pastor to request paid staff members to "refrain from expressing their views on political issues in public media." Charles Burrell was a paid staff member of the church.

[17] According to the deposition testimony of a member of First Federal's board of directors, Lee Dickens, Baugh, at a party at Baugh's country home after Burrell's discharge, expressed to a group of people including Dickens his dissatisfaction with

In a nutshell, Burrell asserts that Baugh, Goldstein, and Baggarly conspired to have her fired in retaliation for her and her husband's public criticism of GMC and thereby violated her First Amendment right to freedom of speech. A review of the facts inferable from the record before the district court reveals, however, that they cannot support a claim that either Baugh or Goldstein engaged in acts which a reasonable public official in Baugh's or Goldstein's shoes would have recognized as violations of Burrell's free speech right. *See Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir.1989) (citing *Anderson v. Creighton*, 483 U.S. 635, 639-41, 107 S. Ct. 3034, 3039-40, 97 L. Ed. 2d 523 (1987)). Assuming, without deciding, that Baugh and Goldstein would have violated a clearly established constitutional right by conspiring with Baggarly to have Burrell fired for speaking out against GMC, the record does not contain inferable facts that could support a finding that either Baugh or Goldstein in any way conspired with Baggarly to discharge her for her public criticism of GMC. Without a conspiracy, there obviously is no constitutional violation. Without a constitutional violation, there can be no violation of a clearly established constitutional right. *See Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir.1992) (citing *Siegert v. Gilley*, ___ U.S. ___, ___, 111 S. Ct. 1789, 1793, 114 L. Ed. 2d 277 (1991)).

Burrell's criticism of GMC. While this statement after Burrell's discharge to a group of people including a member of First Federal's board further supports the inference that Baugh was upset about Burrell's criticism of GMC, it does not permit the inference that Baugh sought to influence members of First Federal's board to fire Burrell.

We emphasize that we do not mean to require section 1983 plaintiffs to produce a "smoking gun" to overcome the qualified immunity hurdle. *See Bendiburg v. Dempsey,* 909 F.2d 463, 469 (11th Cir.1990) (smoking gun not required to establish state action in section 1983 suit), *cert. denied,* ___ U.S. ___, 111 S. Ct. 2053, 114 L. Ed. 2d 459 (1991). Burrell's section 1983 claim against Baugh and Goldstein, however, lacks far more than a smoking gun. Burrell's complaint is made of insinuations that collapsed under the weight of depositions. Pure hearsay allegations evaporated when the purported hearsayers flatly denied having made the statements attributed to them. *See supra* note 13. Evidentiary leads simply did not pan out when put to the deposition test. A cloud of allegations of intense controversy over GMC in Milledgeville could not conceal the absence of any admissible evidence of the alleged conspiracy between Baugh, Goldstein, and Baggarly. Even well-founded allegations of widespread disapproval of the Burrells' criticism of GMC do not permit us to make the quantum leap to inferring the conspiratorial acts that could maneuver Burrell's section 1983 claim against Baugh and Goldstein past the qualified immunity coral.

As the district court correctly noted, *see supra* slip op. at p. 3795, a section 1983 conspiracy may be proved by circumstantial evidence and, in this sense alone, the law does not require the plaintiff to produce a smoking gun. This observation does not relieve us of our duty, however, to scrutinize each piece of admissible circumstantial evidence in isolation and then in combination with all other pieces of admissible circumstantial evidence to determine whether all admissible pieces for a conspiracy make.

Burrell points out that we have recognized a "strong policy reflected in the decisions of the Supreme Court and this Circuit against resolving complex First Amendment issues on a motion for summary judgment." *Harden v. Adams*, 760 F.2d 1158, 1166 (11th Cir.), *cert. denied sub nom. Grimmer v. Harden*, 474 U.S. 1007, 106 S. Ct. 530, 88 L. Ed. 2d 462 (1985). There is nothing complex about the First Amendment issue in this case. Our conclusion that Baugh and Goldstein are entitled to qualified immunity against Burrell's section 1983 claim does not depend on the complexity or simplicity of the constitutional right in question. It turns solely on the absence of facts inferable from the record that support the allegation that Baugh and Goldstein violated any constitutional right, however complex.

Even giving Burrell the benefit of all inferences, the pieces in Burrell's section 1983 puzzle simply do not fit together to create the image of a conspiracy between Baugh, Goldstein, and Baggarly to have her fired for exercising her free speech right. Baugh and Goldstein therefore are immune to Burrell's section 1983 claim.[18]

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[18] We stress that we have jurisdiction only to determine whether Baugh and Goldstein are entitled to qualified immunity against Burrell's § 1983 claim. As we pointed out earlier, *see supra* note 9, we do not decide whether Burrell's § 1983 or 1985(3) claims would survive a summary judgment motion on grounds other than qualified immunity. We merely hold that the record does not permit the inference of facts that, if proved, would establish that Baugh or Goldstein engaged in acts which a reasonable public official in Baugh's or Goldstein's shoes would have recognized as violations of Burrell's free speech right.

B.

Before deciding whether Baugh and Goldstein are entitled to summary judgment against Burrell's section 1985(3) claim, we must determine whether public officials in general can claim qualified immunity to avoid liability under section 1985(3). We hold that they may not and therefore affirm the district court's denial of Baugh's and Goldstein's motion for summary judgment on the ground of qualified immunity as to Burrell's section 1985(3) claim.

While only state actors are subject to a section 1983 claim, a section 1985(3) action may be brought against anyone conspiring to deprive another of the equal protection of the laws, or of equal privileges and immunities under the laws.[19] Unlike a claim under section 1983,[20] which does not need to assert a specific intent to deprive another of a federal right, *see Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), *overruled on other grounds by Monell v. Department of Social Sevs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), a claim under section 1985(3) must allege a class-based, invidiously discriminatory purpose behind the defendants' action. We recently had occasion to comment on the elements of a cause of action under section 1985(3):

> The elements of a cause of action under section 1985(3) are "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the

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[19] *See supra* note 3.

[20] *See supra* note 2.

> equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *United Brotherhood of Carpenters & Joiners of America, Local 610 v. Scott*, 463 U.S. 825, 828-29, 103 S. Ct. 3352, 3356, 77 L. Ed. 2d 1049 (1983). More specifically, the second element requires a showing of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 829, 103 S. Ct. at 3356 (quoting *Griffin*, 403 U.S. at 102, 91 S. Ct. at 1798).

Lucero v. Operation Rescue of Birmingham, 954 F.2d 624, 627-28 (11th Cir.1992) (footnote omitted).

Unlike in section 1983 actions, public officials therefore will not be subject to liability under section 1985(3) unless their actions were motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Id.* This narrow intent requirement erects a significant hurdle for section 1985(3) plaintiffs. Section 1985(3) actions often stand or fall on the plaintiff's ability to establish the specific type of discriminatory animus behind the conspirators' actions. *See, e.g., Scott*, 463 U.S. at 835-39, 103 S. Ct. at 3359-61 (plaintiffs failed to identify requisite class-based animus); *Lucero*, 954 F.2d at 627-29 (same); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 794 (5th Cir.1989) (same). Public officials thereby enjoy an additional protection against section 1985(3) actions not available to them in section 1983 actions. We hold that this additional safeguard obviates the need for granting public officials qualified immunity in section

1985(3) actions. Exposing public officials to section 1983 liability for good faith violations of constitutional rights not clearly established would excessively chill their willingness to make the discretionary calls their office requires of them. There exists, however, no analogue to this convincing policy consideration in the section 1985(3) context. Thre can be no mistake, good faith or otherwise, that acting upon "some racial, or perhaps otherwise class-based, invidiously discriminatory animus" does not fall within the scope of a public official's discretion. Denying public officials qualified immunity under section 1985(3) therefore does not threaten the breathing space they need for making discretionary decisions. On the contrary, "racial, or perhaps otherwise class-based, invidiously discriminatory animus" has no place in public policy and any actions by public officials based on such an animus deserve to be chilled with the full force of federal law.

Accordingly, public officials cannot raise a qualified immunity defense to a section 1985(3) claim. Baugh and Goldstein therefore are not immune to Burrell's section 1985(3) claim.[21]

III.

Goldstein and Baggarly bring appeal No. 90-8540 individually and in their capacities as member of First

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[21] Our conclusion that qualified immunity does not protect public officials from § 1985(3) liability should not be misconstrued as an intimation that we find all the elements of a § 1985(3) claim present in this case. On the contrary, we express serious doubt whether Burrell has alleged facts sufficient to satisfy § 1985(3)'s requirement of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus."

Federal's board of directors, and board member, president, and CEO of First Federal, respectively. We affirm the district court's denial of summary judgment on Burrell's section 1983 and 1985(3) claims. Again, we first address the section 1983 claim.

A.

Settling an issue it had left open in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982), the Supreme Court recently held that private defendants faced with section 1983 liability for invoking a state replevin, garnishment or attachment statute may not avail themselves of qualified immunity. *Wyatt v. Cole*, ___ U.S. ___, ___, 112 S. Ct. 1827, 1829, 118 L. Ed. 2d 504 (1992). The Court thereby directly overruled contrary decisions in three circuits, including our own. *See Jones v. Preuit & Mauldin*, 851 F.2d 1321, 1323-24 (11th Cir.1988) (en banc), *vacated on other grounds*, 489 U.S. 1002, 109 S. Ct. 1105, 103 L. Ed. 2d 170 (1989); *see also Buller v. Buechler*, 706 F.2d 844, 850-53 (8th Cir.1983); *Folsom Inv. Co. v. Moore*, 681 F.2d 1032, 1036-38 (5th Cir. Unit A 1982). Although the Court did not explicitly overrule decisions holding that qualified immunity is available to private defendants in other circumstances, the Court's analysis does not bode well for the continued vitality of these decisions. Instead of restricting its holding to attachment cases, the Court merely left open "the possibility that private defendants faced with [section] 1983 liability under *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982), could be entitled to an affirmative defense based on good faith and/or probable cause or that [section] 1983 suits against private, rather

than governmental parties could require plaintiffs to carry additional burdens." *Wyatt*, ___ U.S. at ___, 112 S. Ct. at 1834.

We need not diagnose the current vitality of court of appeals decisions allowing private defendants to assert qualified immunity in non-attachment cases, however, since they would clearly be distinguishable from the present case even in the event they should survive *Wyatt* intact. Even if *Wyatt* were to permit us to consider these opinions, we would have to conclude that the numerous cases barring private defendants from relying on qualified immunity in section 1983 actions speak more closely to the present case.

A cursory review of the decisions permitting private defendants to claim qualified immunity easily reveals their irrelevance. The Tenth Circuit, in *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir.1988), held that the qualified immunity doctrine protects a private defendant who acted in accordance with the duties imposed by a government contract, performed a governmental function, and is sued solely on the basis of acts performed pursuant to the contract. *Id.* at 722. In *Frazier v. Bailey*, 957 F.2d 920, 929 (1st Cir.1992), the First Circuit held that "private parties under contract to perform statutorily mandated governmental duties are entitled to qualified immunity as functionally governmental employees." *Id.* at 928. In another case, *Rodrigues v. Furtado*, 950 F.2d 805 (1st Cir.1991), the First Circuit similarly ruled that a physician under court order to perform a vaginal cavity search was entitled to raise a qualified immunity defense on the ground that she was "invested with [and ha[d] accepted] the responsibilities of a public

official in the public interest." *Id.* at 815 (quoting *Duncan v. Peck*, 844 F.2d 1261, 1264 (6th Cir.1988)).

Next, we turn to the decisions prohibiting private defendants from asserting qualified immunity. The Ninth Circuit, in *Howerton v. Gabica*, 708 F.2d 380 (9th Cir.1983), withheld qualified immunity from a private landlord who had enlisted the services of a police officer to effect an allegedly unconstitutional eviction. *Id.* at 385 n.10. In so holding, the *Howerton* court suggested that *Lugar* could be read as permitting defendants to raise compliance with a state statute as an affirmative defense. *Id.* (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n. 23, 102 S. Ct. 2744, 2757 n. 23, 73 L. Ed. 2d 482 (1982)). In the recent case of *Felix de Santana v. Velez*, 956 F.2d 16 (1st Cir.1992), the First Circuit refused to extend qualified immunity to a private defendant who conspired with a district attorney to indict a co-worker for perjury. *Id.* at 19-20. Fourteen years earlier, the First Circuit, in *Downs v. Sawtelle*, 574 F.2d 1, 15-16 (1st Cir.), *cert. denied*, 439 U.S. 910, 99 S. Ct. 278, 58 L. Ed. 2d 255 (1978), denied qualified immunity to the plaintiff's sister and spendthrift guardian who was alleged to have conspired with government officials to sterilize the plaintiff against her will, to delay her marriage, and to remove her second child from her custody. *Id.* at 3-4, 15-16. Finally, the Sixth Circuit, in *Duncan v. Peck*, 844 F.2d 1261 (6th Cir.1988), refused to grant private defendants qualified immunity, *id.* at 1263-67, but then went on to find that the private defendant in the case at hand was entitled to summary judgment on the basis of the common law good faith defense to malicious prosecution and wrongful attachment, as opposed to a good faith immunity, *id.* at 1267-68.

This latter set of decisions speaks more meaningfully to the present case. Goldstein and Baggarly did not fulfill their duties under a government contract, *cf. DeVargas*, 844 F.2d at 722; *Frazier*, 957 F.2d at 929, nor were they under a court order to assume the "responsibilities of a public official in the public interest," *cf. Rodrigues*, 950 F.2d at 814 (quoting *Duncan*, 844 F.2d at 1264). Goldstein and Baggarly instead are alleged to have conspired with public officials to deprive Burrell of her constitutional rights. These alleged activities are of the same cloth as the conspiracies alleged in *Santana*, where the private defendant allegedly conspired with a district attorney to indict the plaintiff for perjury, 956 F.2d at 19-20, and in *Downs*, where the private defendant allegedly conspired with public officials to deprive the plaintiff of certain constitutional rights, 574 F.2d at 15-16. Needless to say, the First Circuit held that the defendants in neither case could seek the cover of qualified immunity.

In a case like the present one, where the private defendants are not alleged simply to have fulfilled their duties under a government contract, or have assumed under court order the responsibilities of a public official, but are alleged to have acted in concert with public officials for the sole purpose of depriving another of her constitutional rights, private defendants cannot claim the protection of qualified immunity. We not only have no intention of encouraging this kind of conduct,[22] but most

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[22] Our now defunct decision in Jones relied in part on the consideration that private individuals should be encouraged to avail themselves of state procedures to settle their personal disputes. *See Jones v. Preuit & Mauldin*, 851 F.2d 1321, 1326 (11th

certainly intend to punish it. Private individuals who associate themselves with a public official to encroach on another's constitutional rights must bear the risk of trial.

The qualified immunity defense serves to give public officials the peace of mind required for their day-to-day discretionary decisions. Accordingly, it shields the public official from liability for wrong discretionary calls, provided they were made in good faith. The adoption of the qualified immunity for public officials therefore reflects a policy determination that it is better to have public officials make mistaken decisions based on a good faith interpretation of the law, than not to make any decisions at all. *See Wyatt*, ___ U.S. at ___, 112 S. Ct. at 1833.

In contrast, public policy clearly counsels against employing the qualified immunity defense to encourage private individuals to redress their differences with another by conspiring with public officials to deprive that person of his or her constitutional rights. At any rate, if qualified immunity is not available to "private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid[,]" *id.*, it surely does not protect those who are alleged to have acted in concert with public officials for the sole purpose of violating another's constitutional rights.

Private defendants who allegedly conspired with public officials to deprive another of her constitutional rights therefore are not entitled to qualified immunity under section 1983. Accordingly, qualified immunity does

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Cir.1988) (en banc), *vacated on other grounds*, 489 U.S. 1002, 109 S. Ct. 1105, 103 L. Ed. 2d 170 (1989).

not shield Baggarly and Goldstein against Burrell's section 1983 claim.

B.

In part II B., we established that public officials cannot assert qualified immunity against a section 1985(3) claim. If qualified immunity to section 1985(3) liability is unavailable to public officials, it must also elude private defendants, including Baggarly and Goldstein.[23]

IV.

For the reasons stated above we reverse the denial of summary judgment on the ground of qualified immunity to Baugh and Goldstein as public officials against Burrell's section 1983 claim, and affirm the denial of summary judgment on the ground of qualified immunity against Burrell's section 1983 claim to Goldstein and Baggarly as private defendants. Finally, we affirm the denial of summary judgment on the ground of qualified immunity against Burrell's section 1985(3) claim to Baugh, Goldstein, and Baggarly.

AFFIRMED in part and REVERSED in part.

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[23] As pointed out above, Goldstein brings this appeal, No. 90-8540, individually and in his capacity as First Federal boardmember. See supra slip. op. at p. 3802.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8540

MELBA J. BURRELL,

Plaintiff-Appellee,

versus

THE BOARD OF TRUSTEES
OF GA. MILITARY
COLLEGE, ET AL.,

Defendants,

JACOB L. GOLDSTEIN, ETC., and
ALVA L. BAGGARLY, ETC.,

Defendants-Appellants.

No. 90-8760

MELBA J. BURRELL,

Plaintiff-Appellee

versus

THE BOARD OF TRUSTEES OF GA. MILITARY COLLEGE, ALVA L. BAGGARLY, Individually and in his official capacity as Chief Exec. Officer of First Fed. Sav. and Loan Assn. of Milledgeville, THE MAYOR and ALDERMAN OF THE CITY OF MILLEDGEVILLE and Unknown Co-Conspirators,

Defendants

JAMES E. BAUGH, Indiv. and in his official capacities as Mayor of the City of Milledgeville, Ga. and Chairman of

the Board of Trustees of Ga. Military College, JACOB L. GOLDSTEIN, Indiv. and in his official capacities as a member of the Bd. of Dir. of First Fed. Sav. and Loan Assoc. of Milledgeville and as a member of the Bd. of Tr. of Ga. Military College,

Defendants-Appellants.

No. 90-8930

MELBA J. BURRELL,

Plaintiff-Appellee,

versus

THE BOARD OF TRUSTEES OF GA. MILITARY COLLEGE, JAMES E. BAUGH, Chairman of the Board of Trustees of GA Military College, JACOB L. GOLDSTEIN, As a member of the Board of Trustees of GA Military college, and the MAYOR and ALDERMAN OF THE CITY OF MILLEDGEVILLE,

Defendants-Appellants,

ALVA L. BAGGARLY, ETC., ET AL.,

Defendants.

Appeals from the United States District
Court for the District of
Middle District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Filed Oct 29, 1992)

Before: TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and HILL, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gernald Tjoflat
UNITED STATES CIRCUIT JUDGE

No. 92-1262

Supreme Court, U.S.
FILED
MAR 11 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

MELBA J. BURRELL,

Petitioner,

v.

THE BOARD OF TRUSTEES OF GEORGIA MILITARY COLLEGE; James E. Baugh, individually and in his official capacities as Mayor of the City of Milledgeville, Georgia and Chairman of the Board of Trustees of Georgia Military College; Jacob L. Goldstein, individually and in his official capacities as a member of the Board of Directors of First Federal Savings and Loan Association of Milledgeville and as a member of the Board of Trustees of Georgia Military College; Alva L. Baggarly, individually and in his official capacities as Chief Executive Officer, president and member of the Board of Directors of First Federal Savings and Loan Association of Milledgeville; The First Federal Savings and Loan Association of Milledgeville; The Mayor and Aldermen of the City of Milledgeville; and Unknown Co-Conspirators,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE GOVERNMENT OFFICIAL RESPONDENTS JAMES E. BAUGH AND JACOB L. GOLDSTEIN IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained Respondent local government officials' qualified immunity defense after concluding that there was no factual basis for a finding that they had conspired with Petitioner's private employer to have her terminated and therefore that they could not have committed a constitutional violation.

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No. 92-1262

In The

Supreme Court of the United States

October Term, 1992

MELBA J. BURRELL,

Petitioner,

v.

THE BOARD OF TRUSTEES OF GEORGIA MILITARY COLLEGE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE GOVERNMENT OFFICIAL RESPONDENTS JAMES E. BAUGH AND JACOB L. GOLDSTEIN IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10-37) is reported at 970 F.2d 785. The order of the district court denying Respondents' motion for summary judgment is unreported but appears at (Pet. App. 5-9). An earlier opinion of the district court denying Respondents' motion to dismiss is reported at 696 F.Supp. 1522.

JURISDICTION

The court of appeals denied Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc, on October 29, 1992 (Pet. App. 38-40). The Petition for A Writ of Certiorari was filed on January 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents, without seeking to restate the facts or course of proceedings below, supplement the Petitioner's statement of facts simply to identify Respondents and other parties material to a consideration of the question presented.

Respondent James E. Baugh is the Mayor of the City of Milledgeville, Georgia and is Chairman of the Board of Trustees of Georgia Military College. *Burrell v. The Bd. of Trustees of Ga. Military College, et al.*, 970 F.2d 785, 786 (Pet. App. 11). Respondent Jacob L. Goldstein is a member of the Board of Trustees of Georgia Military College. *Id.*

Alva L. Baggarly was Chief Executive Officer, President, and a member of the Board of Directors of First Federal Savings and Loan Association of Milledgeville, a private banking association. *Id.* Baggarly fired Burrell on April 21, 1988. *Burrell, supra*, 970 F.2d at 792 (Pet. App. 25). Petitioner alleged that she was fired from her job as First Federal's Senior Vice President as a result of a conspiracy, the object of which she contends was to discharge her from her private employment with First Federal in retaliation for her and her husband's public

criticism of Georgia Military College. *Burrell, supra,* 970 F.2d at 786, 787. (Pet. App. 11-13).

ARGUMENT

Although the Petition sets forth two enumerated questions presented, the supporting argument rests on the single contention that "Respondents could not have been acting within the sphere of their official discretionary responsibilities when they allegedly conspired to have Petitioner discharged from her private sector employment in retaliation for her exercise of protected speech." (Pet. App. 6). Observing that government officials may claim qualified immunity only with respect to discretionary functions, Petitioner asserts that the Respondents "did not make, and could not have made, any showing that their official discretionary duties, as members of the board of a public educational institution or as a mayor of a city, included playing any part whatsoever in a private lending institution's decision to discharge one of its employees." (Pet. App. 8).

Certiorari should not be granted on this issue for several related reasons. First, although the court of appeals viewed its interlocutory jurisdiction as limited to reviewing the denial of Respondents' motion for summary judgment on the defense of qualified immunity, *Burrell, supra,* 970 F.2d at 789, n.9, 793, n.18 (Pet. App. 18, n.9 and 28, n.18), its particular reason for upholding qualified immunity targeted the prima facie case. The court's decision turned entirely on Petitioner's failure after full discovery to develop facts of record sufficient to

warrant a trial on the existence of a conspiracy between Respondent government officials and her own private employer and hence on the impossibility of demonstrating a constitutional violation. As Petitioner argues, (Pet. App. 6-7), the "discretionary functions" issue on which certiorari is sought is at most a prerequisite to the affirmative defense[1] of qualified immunity; it does not relate to the sufficiency of her prima facie claim or the conspiracy element of that claim which the court of appeals found fatally defective. Accordingly, a ruling by this Court about the "discretionary functions" aspect of qualified immunity would in the end have no bearing on the outcome of the Section 1983 claims against the Respondents and would therefore be wholly advisory.

That the court of appeals' decision turned in substance on the deficiency of the prima facie claim rather than on any view about a "discretionary functions" precondition to the qualified immunity defense appears

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[1] The Court has consistently viewed qualified immunity as an affirmative defense which, if sustained, may relieve the government official defendant of the burdens of discovery, trial, or both. *See Gomez v. Toledo*, 446 U.S. 635 (1980); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Siegert v. Gilley*, ___ U.S. ___, 111 S.Ct. 1789, 1793 (1991). *See also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. ___, 1993 WL 52174 (U.S. March 3, 1993). Of course a defendant ultimately has no need to rely on such a defense if it can earlier conclusively demonstrate the Plaintiff's inability to prevail on an indispensable element of the prima facie claim. This is what happens when, as required by *Siegert*, a court, in initially analyzing the qualified immunity defense to a claim under Section 1983, concludes that the plaintiff has failed to allege or present a triable issue of fact concerning the violation of a cognizable constitutional right.

quite plainly from the face of its opinion: "Our conclusion that Baugh and Goldstein are entitled to qualified immunity . . . turns solely on the absence of facts inferable from the record that support the allegation that Baugh and Goldstein violated any constitutional right. . . . " *Burrell, supra,* 970 F.2d at 793 (Pet. App. 28). As the court explained, "[T]he record does not contain inferable facts that could support a finding that either Baugh or Goldstein in any way conspired with Baggarly to discharge [Petitioner] . . . for her public criticism of GMC. Without a conspiracy there obviously is no constitutional violation. Without a constitutional violation, there can be no violation of a clearly established constitutional right." *Burrell, supra,* 970 F.2d at 792 (Pet. App. 26). In other words, the court avoided the threshold qualified immunity question of whether the right allegedly violated was clearly established by determining at the outset that, absent a conspiracy, there could be no constitutional violation of any kind here, and in turn no triable prima facie case. Its resolution of those issues in that order was obedient to the mandate of *Siegert v. Gilley,* ___ U.S. ___, 111 S.Ct. 1789, 1793 (1991), which the court cited after the last quoted sentence from its opinion.

Because the court of appeals in the ordinary course of resolving the qualified immunity question ultimately concluded that there was a fatal deficiency in Petitioner's prima facie case, it is immaterial that it conducted its analysis on the assumption that Respondents could otherwise claim qualified immunity. Indeed the fact that the court of appeals simply "assumed for purposes of this appeal" that Respondents "are government officials for qualified immunity purposes" (Pet. App. 20) further

underscores why this case is an inappropriate vehicle for raising a question about the contours of the discretionary functions prerequisite to qualified immunity. Neither opinion below addresses this issue. Petitioner admits as much in asserting that the court of appeals' decision "made absolutely no inquiry into whether the alleged unconstitutional acts of Respondents . . . were within the sphere of their official discretionary responsibilities."[2]

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[2] Petitioner is correct that the court of appeals did not discuss a discretionary functions requirement to invoking qualified immunity. Absent any discussion of the issue in the court's opinion, it is difficult to understand the basis of Petitioner's speculation (Pet. App. 10) that the decision "will serve as persuasive authority in other circuits for government officials seeking to invoke qualified immunity in cases where their actions are undisputably not within the sphere of official discretionary duties."

It is not at all clear, however, that, as Petitioner argues (Pet. App. 10), the court of appeals "simply ignored" the discretionary duties issue. In another part of the opinion in which it prohibited private defendants like Petitioner's employer from asserting qualified immunity, the court observed that the defense "serves to give public officials the peace of mind required for their day-to-day discretionary decisions. Accordingly, it shields the public official from liability for wrong discretionary calls. . . . " *Burrell, supra,* 970 F.2d at 796 (Pet. App. 36). Thus although the court was evidently aware of the discretionary functions issue, it nevertheless simply "assumed for purposes of this appeal" that Respondents could invoke qualified immunity (Pet. App. 20), evidently understanding that the deficiencies in Petitioner's prima facie case were dispositive in any event. As the court observed, its decision for Respondents turned " . . . solely on the absence of facts inferable from the record that support the allegation that Baugh and Goldstein violated any constitutional right, however complex." *Burrell, supra,* 970 F.2d at 793 (Pet. App. 28).

(Pet. App. 7). Far from identifying any conflict in the views of the circuit courts on this issue (*See* SCR 10.1.(a)), Petitioner cites not a single lower court opinion elaborating on this Court's observation in *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982), that "Immunity generally is available only to officials performing discretionary functions." *See* Pet. App. at 6-7.

This case is an especially inapt vehicle for the Court's reconsideration of the meaning of that requirement because there is a distinct deficiency in Petitioner's prima facie case (i.e., apart from the absence of a triable issue of conspiracy) that should similarly doom this litigation irrespective of the discretionary functions issue. Petitioner asserts that Respondents' alleged conspiracy with Petitioner's private employer had "*nothing* whatsoever to do with official discretionary duties." (Pet. App. 9 *emphasis in original*). She explains that Respondents "did not make, and could not have made, any showing that their official discretionary duties, as members of the board of a public educational institution or as a mayor of the city, included playing any part whatsoever in a private lending institution's decision to discharge one of its employees." This argument simply fuels the "serious doubts" expressed by the court of appeals (*Burrell, supra*, 970 F.2d. at 790, n.12, Pet. App. 20) whether Petitioner can show "state action under the First and Fourteenth Amendments" or "action under color of state law for Section 1983 purposes, even assuming counterfactually that . . . [she] had managed to fill the record with inferable facts supporting a finding that Baugh, Goldstein and Baggarly conspired to have [her] fired." Lack of state action would be just as conclusive and independent a

prima facie barrier to Petitioner's claim as the lack of a triable case of conspiracy already found by the court of appeals; either conclusion would render wholly advisory an opinion by this Court about the prerequisites to the affirmative defense of qualified immunity.

CONCLUSION

The Petition for Writ of Certiorari should be denied. Respectfully submitted this 11th day of March, 1993.

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